86-519

No. ____

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SCHIAVONE CONSTRUCTION COMPANY, RAYMOND J. DONOVAN, RONALD A. SCHIAVONE, RICHARD C. CALLAGHAN, JOSEPH A. DiCAROLIS, MORRIS J. LEVIN, ALBERT J. MAGRINI, GENNARO LIGUORI, and ROBERT GENUARIO,

Petitioners,

—against—

MARIO MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, erred in allowing the District Attorney of Bronx County, New York, to use secret federal grand jury materials at the Bronx County criminal trial of petitioners, without a showing of particularized need for such materials.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The following parties may have an interest in the outcome of this proceeding:

Raymond J. Donovan

Schiavone Construction Company

Ronald A. Schiavone

Richard C. Callaghan

Joseph A. DiCarolis

Morris J. Levin

Albert J. Magrini

Gennaro Liguori

Robert Genuario

Jopel Contracting and Trucking Corporation

Joseph L. Galiber

William P. Masselli

Hon. Mario Merola, District Attorney, Bronx County, New York

United States Department of Justice

Hon. Leon Silverman, Former Special Prosecutor

All of the above parties have been served with copies of this petition.

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OPINIONS BELOW

This petition for a writ of certiorari seeks review by this Court of an Order of the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 (the "Special Division"). The Order, together with previous orders entered by the Special Division, was filed under seal by order of the Special Division and has been made available to this Court under separate cover. We respectfully request this Court to retain these orders under seal.

JURISDICTION

The Order of the Special Division to which this petition is addressed was entered on July 30, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal statutory provision involved is Rule 6(e)(2) and (3) of the Federal Rules of Criminal Procedure:

Rule 6. The Grand Jury

(e) Recording and Disclosure of Proceedings.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist

an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

STATEMENT OF THE CASE

Petitioners Schiavone Construction Company, Raymond J. Donovan, Ronald A. Schiavone, Richard C. Callaghan, Joseph A. DiCarolis, Morris J. Levin, Albert J. Magrini, Gennaro Liguori and Robert Genuario by this Petition seek review of the Special Division Order authorizing the Bronx County District Attorney ("DA") to disclose at a public trial minutes of the federal grand jury inquiry conducted by Special Prosecutor Leon Silverman with respect to Raymond J. Donovan,[1] pursuant to 28 U.S.C. § 591 *et seq*. The Order also

1 Secretary of Labor Donovan was the subject of an investigation by Special Prosecutor Leon Silverman, who was appointed by the Special Division on December 29, 1981. In connection with this investigation, a Grand Jury was impanelled on February 1, 1982 in the Eastern

permits the Bronx DA to use at trial notes of interviews of the defendants and others that were furnished by the Special Prosecutor pursuant to previous orders of the Special Division. As found by the dissent below, the Bronx DA's submissions in support of his Application for Disclosure of matters occurring before the federal grand jury "totally fail to establish any particularized need for the Silverman Grand Jury minutes." (15a).[2]

By various sealed orders entered during the period from November 12, 1982 to August 17, 1984, the Special Division directed Special Prosecutor Silverman to disclose certain confidential materials, including minutes of the proceedings before the federal grand jury, to the Bronx DA for the purpose of the DA's conducting a state grand jury investigation. On September 24, 1984, a Bronx County, New York grand jury returned a 137-count indictment against petitioners and three other defendants. The orders granting disclosure of the grand jury materials specifically directed that the Bronx DA "shall not make disclosure of the contents of these records except to a duly constituted grand jury in Bronx County, New York, and such government personnel as are deemed necessary by the District Attorney of Bronx County in the performance of his duty to investigate and present evidence before a grand jury and to enforce the laws of the State of New York." (24a, 30a, 33a, 34a). According to the dissent below, the Bronx DA "was at no time authorized to make the materials public at a trial or in any other way."[3] (14a-15a). On February 7, 1986, the Bronx DA

District of New York. The Special Prosecutor concluded that there was no creditable evidence to support any allegation against Secretary Donovan.

2 References (*e.g.*, "15a") are to the sealed orders filed as a confidential Appendix under separate cover with this Court.

3 On April 29, 1985, the Supreme Court of the United States denied Raymond J. Donovan's Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Counsel, Ethics in Government Act of 1978, which sought review of that Court's December 5, 1984 order

moved for permission to authenticate and disclose the materials at the trial of the Bronx County indictment.

On March 26, 1986, the Special Division entered an Order directing the Bronx DA to show a particularized need for the materials sought for disclosure at trial by furnishing as to each item the facts establishing: (1) how it is essential to avoid a miscarriage of justice; (2) the specific offenses, or elements thereof, to which it is specifically relevant; (3) whether other evidence is available that would prove the facts sought to be proved by the items sought; (4) how the DA proposed to use the item at trial (*e.g.*, as substantive evidence on his direct case, impeachment, or refreshment of recollection), and (5) other details indicating the particularized evidentiary need and compelling necessity for each item requested. (21a). On May 25, 1986, the Bronx DA responded to the Special Division's Order but "failed completely to supply any of the information ordered by [the Special Division] to be furnished." (15a). Rather than showing the relevancy of each item of evidence requested to any of the specific charges in the indictment or whether the fact sought to be proved could be established through other non-secret evidence, the DA furnished "only his unsupported general conclusory statement . . . to the effect that the items are relevant to the offenses charged and not otherwise available." (16a).

On July 30, 1986, the Special Division granted the DA's Motion for Disclosure or Exemplification of the sealed grand jury materials previously disclosed to the DA for use as

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refusing to vacate its prior orders and refusing to require the Bronx District Attorney to return all the material previously ordered to be disclosed to him. Petitioner Donovan then argued that the disclosure orders were granted in violation of 28 U.S.C. §§ 593 and 595, and in violation of Rule 6(e) of the Federal Rules of Criminal Procedure in that the Special Court had no jurisdiction to order disclosure of grand jury materials that were not part of Special Prosecutor Silverman's report, that the applications for such orders were made *ex parte*, without proper notice to Secretary Donovan or other interested individuals, and that the Bronx DA failed to demonstrate compelling necessity or particularized need for disclosure of the grand jury materials.

testimony in the trial of petitioners on the Bronx County indictment.[4]

REASONS FOR GRANTING THE WRIT

THE SPECIAL DIVISION'S ORDER AUTHORIZING RELEASE OF GRAND JURY MINUTES CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, AND UNDERMINES THE SPIRIT OF THE ETHICS IN GOVERNMENT ACT

Preliminary Statement

The Special Division created by Congress under the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*, has the first and last word, subject only to review by this Court upon application by petition for a writ of certiorari. Thus, by virtue of this structure, petitioners are denied any intermediate review. We suggest that this *sui generis* situation demonstrates a special and compelling reason for granting certiorari.

Such applications are rare because the Special Division itself rarely convenes. It is the very genius of the Ethics in Government Act that it provides a mechanism in certain very limited instances for the prompt, thorough, and efficacious investigation of the very highest class of officers in the executive branch of the federal government. But it is this design which the petitioners, and Judge Mansfield below, suggest will be frustrated because of the chilling effect upon witnesses who might otherwise have cooperated in investigations pursuant to the Act if the Special Division majority's decision remains undisturbed.

While Rule 6(e) of the Federal Rules of Criminal Procedure and the decisions of this Court construing it require that persons seeking grand jury transcripts demonstrate that there is

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4 The Court also granted the DA's Motion for Disclosure or Exemplification of the sealed materials previously disclosed to him for use as testimony in an unrelated murder trial.

a compelling necessity or particularized need for the disclosure of the materials, the Ethics in Government Act goes farther. In addition to the restrictions placed on the release of grand jury proceedings by Rule 6(e), the Ethics in Government Act, in its specific provisions and legislative history, imposes additional limitations on the release of material generated in investigations of those "high level" officials subject to the Independent Counsel (formerly Special Prosecutor) provisions of the Act, 28 U.S.C. § 591 *et seq.* In this respect, the Act provides generally that the Special Prosecutor, following his investigation, shall make a report of his investigation which the "division of the court may release to . . . any appropriate person such portions of [the] report . . . as the division deems appropriate." 28 U.S.C. § 595(b)(3). It was the report of Special Prosecutor Silverman that furnished the basis for the DA's request for grand jury material. The irony of the Special Division's Order authorizing disclosure of the grand jury material is that in its rush to find release "appropriate", the Division failed to find that there was a compelling necessity or particularized need for the disclosure of the material.

The wholesale disclosure of the grand jury material is reviewable *only* by this Court; its consideration of the issue is therefore essential here.

Argument

Without having made an explicit finding of compelling necessity or particularized need for disclosure of federal grand jury materials, the Special Division has ordered the release of such materials for use at a state criminal trial by a prosecutor who has shown no more than that the materials are sought for his own convenience, and not because of any particularized need. Such a drastic departure from the requirements of Rule 6(e) and the controlling decisions of this Court deserves this Court's attention.

With certain exceptions noted in Fed. R. Crim. P. 6(e)(3)(c), that Rule mandates that grand jury minutes be kept secret. As

this Court stated in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979): "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." The Court has "consistently construed the Rule [6(e)(3)(c)(i)] . . . to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983); *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 567-68 (1983); *Douglas Oil v. Petrol Stops Northwest*, *supra*, 441 U.S. at 221-24.

Though the Special Division paid lip-service to the *Douglas Oil* standard, by the July 30 order releasing the grand jury materials it abandoned the standard. In response to the clearly inadequate showing of particularized need in the DA's February 7, 1986 application for permission to authenticate and disclose the materials at petitioners' Bronx County trial, on March 26, 1986 the Special Division directed the DA to comply with Rule 6(e) by providing the following information:

(1) how each said item is needed to avoid a miscarriage of justice in the trial of defendants . . . ;

(2) the specific offense, or element thereof, to which each said item is specifically relevant;

(3) how the need for disclosure of each item exceeds the need for continued secrecy;

(4) what particularized evidentiary need and compelling necessity requires the disclosure of each requested item;

(5) whether the material described in each item is sought to be used as substantive evidence, to impeach a witness, refresh a witness' recollection, to test a witness' credibility, or for other evidentiary purposes; and

(6) setting forth such further information and authorities under existing federal law as will assist the court in ruling on the motions for Disclosure and Exemplification of each of the aforementioned 70 items.

(21a). The Special Division thus recognized that no such showing had previously been made.

The Bronx DA's response to the Special Division's order "failed completely to supply any of the information ordered by [the Special Division] to be furnished." (15a). The Bronx DA made no effort "to show the relevancy of each item of evidence requested to any of the specific charges in the indictments or whether the fact sought to be proved can be established through other non-secret evidence." (15a).

On the contrary, in a detailed affidavit to the Special Division, the former Assistant Special Prosecutor demonstrated that "alternative non-secret sources exist for proof of many of the items of information sought" from the grand jury minutes. (16a). In this regard, as the dissent below noted:

> For instance, operative documents relied upon by the DA as proof of facts alleged in the state indictments not only exist but are available to the Bronx DA and are provable merely by authenticating signatures. The substance of defendant Raymond Donovan's testimony before the Silverman grand jury is to be found in testimony given by him at the hearing held by the United States Senate before his confirmation as U.S. Secretary of Labor, his testimony before the Bronx grand jury itself, and a hearing held by the United States District Court for the Southern District of New York upon the petition for removal of the Bronx County criminal case against the Schiavone defendants to that court. Many of the central facts sought to be proved by the Bronx DA in support of the state court indictment for grand larceny, which involves the history of Schiavone Construction Company, its relations with Nargi, Jopel, the New York City Transit Authority, its construction of the so-called "5B" tunnel and related

> matters, are admitted in detail in the sworn complaint by the Schiavone company in the Southern District of New York against the New York City Transit Authority, Bronx District Attorney Mario Merola and others, which was filed prior to the Bronx County indictment against the Schiavone defendants and is sworn to by Ronald A. Schiavone.

(16a-17a).

Notwithstanding its March 26, 1986 Order, the Special Division concluded that it "need not consider whether the District Attorney's request alternatively for disclosure meets the particularized need standard of Rule 6(e)," (9a), claiming that "the policies underlying the general rule of grand jury secrecy and the particularization furnished by the District Attorney support our granting the District Attorney's motion for exemplification." *Id.* But in its clumsy attempt to distance itself from its own directive requiring a demonstration of particularized need and compelling necessity, the Special Division ignored the fact that the Bronx DA could "obtain all of the evidence needed for trial of the pending indictments without destroying the strong policy of secrecy attaching to federal grand jury proceedings," as the dissent below concluded. (18a).

The Special Division's order not only violates this Court's decisions in *Douglas Oil Co.*, *Abbott & Associates*, and *Sells Engineering*, *supra*, it is in direct conflict with the decision of another federal Court of Appeals. To establish particularized need and compelling necessity for disclosure, as required by the applicable law and the Special Division's own order of March 26, 1986, the District Attorney was required to show that the disclosure of the grand jury materials is "the *only* means by which the information can be obtained." *In re Disclosure of Evidence*, 650 F.2d 599, 602 (5th Cir.), *modified*, 662 F.2d 362 (1981). The record in this case makes plain that the Special Division's order departs from not only the established precedent of this Court, but also the standard for disclosure promulgated by the Fifth Circuit. As noted by the

dissent below, disclosure of the grand jury materials was not the only means by which the information could be obtained by the Bronx DA. The conflict between the standard utilized for disclosure in this case and that set forth by the Fifth Circuit in *In re Disclosure of Evidence* could not be more complete.

On this record, it is equally evident that as the dissent below observed, "the Bronx DA seeks the Silverman grand jury minutes solely for his own convenience and not because of any 'particularized need' for it as required under Rule 6(e)(3)(c)(i) by controlling decisions of the United States Supreme Court." (17a).

The Special Division's Order not only violates the letter and spirit of Rule 6(e) and interpretive decisions of this Court, it runs counter to decisions of courts that have consistently held that economy or convenience is not a sufficient basis for disclosure of grand jury materials. *See In re Grand Jury Matter*, 697 F.2d 511 (3d Cir. 1982); *In re Grand Jury Matter (Catania)*, 682 F.2d 61 (3d Cir. 1982); *In re Disclosure of Evidence*, 650 F.2d 599 (5th Cir.), *modified*, 662 F.2d 362 (1981); *see also In re Grand Jury Disclosure*, 550 F. Supp. 1171 (E.D. Va. 1982). Given the sheer bulk of the material ordered disclosed and the completely inadequate showing of particularized need, this case stands in marked contrast to the formidable authority of courts at every level of review denying disclosure in the absence of compelling necessity.

The Special Division's Order granting the District Attorney's blanket request for disclosure, based upon an utterly inadequate showing of particularized need and compelling necessity, raises broader policy concerns. If state prosecutors enjoyed unfettered access to federal grand jury materials, "there would be little reason for them to resort to their usual, more limited avenues of investigation." *United States v. Sells Engineering, Inc.*, *supra*, 463 U.S. at 433. To allow state prosecutors to circumvent their usual methods of investigation would "subvert the limitations and procedural requirements built into those methods." *Id.* at 434.

Significantly, as Judge Mansfield observed below, the Special Division's Order "will have the unfortunate effect of discouraging witnesses and parties in future grand jury proceedings under the Ethics in Government Act from cooperating with Independent Counsel in other investigations for fear that this Division of the Court will order public disclosure of evidence entitled to secrecy as a matter of law." (18a).

The Special Division has thus created a precedent directly at odds with this Court's decisions in *Douglas Oil Co.*, *Abbott & Associates*, and *Sells Engineering*, in conflict with the Fifth Circuit's decision in *In re Disclosure of Evidence*, *supra*, and contrary to the spirit of the Ethics in Government Act. Plenary consideration of the matter by this Court is essential.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Dated: New York, New York
September 25, 1986

Respectfully submitted,

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